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IN THE

Supreme Court of the United States

OCTOBER TERM—1965

No. 178

MITCHELL FOODS, INC., AND
FRANK S. MITCHELL,
Petitioners,

VS.

RICH PRODUCTS CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 1360

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I. OPINION BELOW

The opinion of the District Court is reported at 246 F. Supp. 392. (Pet. pp. 14a-21a) The opinion of the Court of Appeals for the Second Circuit is reported at 357 F. 2d 176. (Pet. pp. 1a-11a) The decision of the Court of Appeals denying a petition for rehearing is set forth in the Petition at p. 13a.

II. JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

III. QUESTION PRESENTED

Whether in view of this Court's recent decisions in *Graham* v. *John Deere Co.*, 383 U. S. 1 (1966), and *United States* v. *Adams*, 383 U. S. 39 (1966), the Court of Appeals

erred in concluding that the subject matter of the patent in suit was not obvious to a person skilled in the art at the time of the invention and that the patent is therefor valid.

IV. STATUTE INVOLVED

The pertinent statute, namely 35 U. S. C. § 103, is set forth in the Petition at pp. 2-3.

V. STATEMENT OF THE CASE

The following facts are taken verbatim from the Findings of Fact of the District Court or the opinion of the Court of Appeals and are fully and completely supported by the Record. These facts are not challenged in the Petition based on lack of Record support.

A. The Patent in Suit

This patent covers liquid emulsions which change, when whipped, in appearance and characteristics into a firm non-pourable product suitable as a salad or dessert topping. (Pet. p. 14a)

The whippable emulsions of the patent have at least four essential ingredients: (a) water, (b) an edible fat, (c) a substituted cellulose of a special type, and (d) at least one of a *specified** group of emulsifiers. Sweeteners or flavoring substances may be, and are, normally added. (Pet. p. 14a)

The edible fat may be derived from animal or vegetable sources. The substituted cellulose used is one which has been modified to replace some of the hydrogen atoms in the chemical composition with methyl groups. The

*Note that petitioners inaccurately changed this word "specified" to "large" in their Statement of the Case on page 3 of the Petition.

emulsifiers used are set forth in their chemical terminology in the specification and claims. These emulsifiers have been identified in the patent and at the trial by their trade names, Spans, Tweens, Myverols and Myrj.* (Pet. p. 14a)

B. Advantages of the Patented Compositions

The desirable qualities of a whipped topping are: reliable whipping in a relatively short time; a consistently high yield of whipped topping as compared to the liquid emulsion; a consistently stable topping which will not shrink, weep, or collapse; and a relatively long storage period without spoiling. The whipped topping covered by the patent in suit has all of these desirable qualities. (Pet. p. 15a)

C. Prior Art Relied Upon By Petitioners

Petitioners rely heavily on British Patent No. 555,361 (DE 99-103) which was extensively considered by the Patent Office in the prosecution of the application for the patent in suit. The British patent teaches the preparation of a cream substitute in two steps.

First, an aqueous gum base is prepared by mixing an aqueous suspension of an emulsifying agent "A", which consists of a harmless chloride, a harmless salt of tri-basic acid, and an edible vegetable gum such as sodium alginate

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*These emulsifiers are defined in their chemical terminology in the claims of the subject patent as follows:

—"complex mixtures of partial esters of fatty acids and hexitol anhydrides derived from sorbitol" (Spans);

—"complex mixtures of partial esters of fatty acids and sorbitol—derived hexitol anhyrides in which polyoxy-ethylene chains have been added to the non-esterified hydroxyl groups of the hexitol anhydride" (Tweens);

—"refined complex mixtures resulting from the metathetical reaction of complete glyceride fat with an excess of glycerol" (Myverol); and

—"mixture of the esters resulting from the direct esterification of fatty acid with polymerized ethylene oxide" (Mryj) (PE5)

with an emulsifying agent "B" comprising a cellulose derivative; secondly, the aqueous gum base is blended with a fat selected from a specified group of oils, and water is added to complete the composition.

The basic composition of the cream substitute of the British patent consists of water, fat, and emulsifying agents "A" and "B". The British patent teaches that emulsifying agents "A and "B" *must* be used in each instance. Neither of these specified emulsifying agents of the British patent was comparable to any of the four classes of emulsifying agents specified in the patent in suit. There is no ingredient in the patent in suit comparable to emulsifying agent "A". (Pet. pp. 16a-17a)

Petitioners also rely on an article, "Certain Partial Ester Emulsifier Levels in Food", by C. F. Pratt (DE 111-116). This article deals with the safe levels of use of four classes of emulsifiers in a wide variety of applications. Although it discloses the uses of these emulsifiers in many products, it does not mention a whipped topping containing a substituted cellulose. While it mentions that emulsifiers are of practical use in the making of popular cream whips, it does not say which, if any, would produce a result comparable to that achieved by the patent in suit, nor does it suggest any formula for such use; nor does it suggest how such a result could be achieved through the use of a particular emulsifier together with the teaching of the British patent. (Pet. pp. 6a-7a; 18a)

D. Lower Court Holdings on Issue On Which Petitioners Seek Review

The District Court found that:

> "The patent in suit defines a new and useful product which represents a *material advance* over the prior art." (Pet. p. 18a)

The Court of Appeals held on the issue of "Obviousness of Subject Matter," as follows:

> "On the facts before us, which we have found to be clearly supported by the evidence, we conclude that the subject matter as a whole was not, at the time of the invention, obvious to a person having skill in the art.
>
> "The patent taught a formula which allowed the successful production, for the first time, of a substitue cream product which embodied not only characteristics of long life, but also of consistency, volume and whippability, which were commercially desirable. In other words, it furnished a satisfactory amount of whipped topping for the quantity of emulsion used; and the topping produced, unlike others, did not collapse but was unusually stable and held its whipped form. This advance was the result of something more than simply the skill and knowledge possessed by one familiar with the art. See, e.g. *Lyon* v. *Bausch & Lomb Optical Co.*, 224 F. 2d 530, at 534-36 (2d Cir.), cert. den. 350 U. S. 911 (1955); *Reiner* v. *I. Leon Co.*, 285 F. 2d 501, at 503-4 (2d Cir. 1960), cert. den. 366 U. S. 929 (1961)." (Pet. pp. 8a-9a)

E. Products Produced By Parties Prior to Issuance of Patent

The whippable emulsions manufactured and sold by both petitioners and respondent before they had knowledge of the disclosures of the patent, were comprised of water, fat, protein containing material and an emulsifier. These products which contained protein tended to develop undesirable flavors due to rancidity or souring, after a short time, and did not give a consistently high yield, comparable to the emulsions of the patent (Pet. p. 18a).

F. Acts of Petitioners Prior To and After Issuance of Patent

The proof establishes that the petitioners had, prior to obtaining a copy of the patent, attempted without success to develop a whippable emulsion using substituted celluloses. These unsuccessful attempts were made by the petitioner, Frank S. Mitchell. He had had a number of years of practical experience in this field.

The advantages of the patent disclosures in providing a non-protein type of whippable emulsion with desirable stability, short whipping time, consistently high yield, and long storage life, were readily recognized by the petitioners. It was not until they obtained a copy of the patent in suit that they began to market such a product (Pet. pp. 9a, 18a-19a).

G. Infringement

The commercial products of the petitioners which they produced at the time of the District Court decision and which they did produce at and prior to December, 1962, infringed the patent in suit (Pet. p. 21a).

VI. ARGUMENT

The issue in the present case is very narrow indeed and does not warrant review by this Court on certiorari. The sole issue is whether in view of the recent patent decisions by this Court* construing 35 U. S. C. § 103 the Court of Appeals on the issue of obviousness erred in holding:

> "On the facts before us, which we have found to be clearly supported by the evidence, we conclude that the subject matter as a whole was not, at the

Graham v. *John Deere Co. and United States* v. *Adams*, supra, p. 1.

time of the invention, obvious to a person having skill in the art."

and

"This advance was the result of something more than simply the skill and knowledge possessed by one familiar with the art." (Pet. pp. 8a-9a)

In claiming error petitioners make much of the fact that the Court of Appeals decision was handed down six (6) days prior to this Court's decisions. However, petitioners called this fact and this Court's recent decisions to the attention of the Court of Appeals on their Petition for Rehearing and after due deliberation the Court of Appeals denied the Petition for Rehearing some fifty (50) days after said decisions of this Court in the following manner:

"We have considered the case in the light of (1) *Graham* v. *John Deere Co.*, 383 U. S. 1, 34 U. S. L. W. 4119 (1966) and (2) *United States* v. *Adams*, 383 U. S. 39, U. S. L. W. 4132 (1966), and are of the opinion that they do not require a change of holding." (Pet. p. 13a)

It should also be noted that in their Petition for Rehearing to the Court of Appeals the petitioners accused that Court of applying a relaxed standard under § 103 to no avail.

A. Alleged Conflict Between Recent Decisions of This Court and Certain Second Circuit Decisions

A principal point which petitioners allege over and over in their brief is that the Court of Appeals "based its decision of non-obviousness on its 1955 decision in *Lyon* v. *Bausch* v. *Lomb Optical Co.*, 224 F. 2d 530, 534-36, and

its 1960 decision in *Reiner* v. *I. Leon Co.*, 285 F. 2d 501, 503-4"* (Pet. p. 5) and these decisions are in conflict with the standard of non-obviousness for patentability under 35 U. S. C. § 103 set forth by this Court in its recent decisions (Pet. pp. 2, 5-6, and 7).

Answers to this argument are set forth below.

1. *Hotchkiss* v. *Greenwood* Standard Applied by Court of Appeals

In the *Bausch & Lomb* and *Reiner* cases Judge Learned Hand stated that in enacting 35 U. S. C. § 103 Congress "meant to restore" the standard of invention laid down in *Hotchkiss* v. *Greenwood,* 11 How. 248 (1850) and went on to apply this standard in each case.** Of course, this is the same authoritative standard this Court applied in the *Graham* and *Adams* cases. See *Graham* case at pp. 10-19.

Also in this Court's recent decisions it made it clear that the standard "has remained invariable in this Court",*** and this Court denied certiorari in the *Bausch & Lomb* and *Reiner* cases.

Thus, as a matter of law, the Court of Appeals applied the *Hotchkiss* v. *Greenwood* standard in the present case in upholding the validity of the patent in suit. That Court did not allude to any lowering of the standard, as it did in the *Bausch & Lomb* case, and clearly did not apply a lowered standard of patentability as contended by petitioners. As set forth in detail below, it applied the very standard set forth in the *Graham* and *Adams* cases to determine the question of obviousness.

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*Note that petitioners cited these two cases four (4) times and failed in each instance to include "cert. den. 350 U. S. 911 (1955)" and "cert. den. 366 U. S. 929 (1961)", respectively.

***Bausch & Lomb* case at pp. 534-6 and *Reiner* case at pp. 503-4.

****Graham* case at p. 19.

2. *Reiner* Case Cited in the *Graham* Case

One of the cases which petitioners argue is in conflict with the *Graham* and *Adams* cases is the *Reiner* case. But this case is cited with respect to § 103 tests of non-obviousness in the *Graham* case at p. 36. And the very page (p. 504) from the *Reiner* case cited in the *Graham* case was a page cited in the Court of Appeals decision (Pet. p. 9a).

Further, it is very evident from reading Judge Learned Hand's decision in the *Reiner* case that he was there applying the same standard that he had earlier applied in *Bausch & Lomb* case. This is the other case which petitioners argue is in conflict with this Court's recent decisions.

B. Substantive Consideration of the Facts of This Case in Light of This Court's Recent Decisions

It is most significant that in asking this Court to review on the sole issue of the effect of its recent decisions the petitioners fail to quote from these decisions or in any way apply the standards set down in these decisions to the established facts in the present case. The reason petitioners fail to go into the merits becomes readily apparent when it is seen how such a substantive approach would have been self-defeating.

In the *Graham* case, this Court states that the § 103 condition for patentability "lends itself to several basic factual inquiries" and went on to enumerate them as follows, at pp. 17-18:

> "Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial suc-

> cess, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy."

These foregoing "basic factual inquiries" are made below into the facts of this case to show that these facts meet the *Graham* standard of nonobviousness.

1. "Scope and Content of the Prior Art"

The disclosure of the British Patent No. 555,361 relied upon by petitioners is detailed above at pp. 3-4. It is significant that this patent calls for two emulsifying agents "A" and "B" which are essential and critical and must *both* be used in each instance as admitted by petitioners' expert (PA 40-1). There is no ingredient in respondent's patent comparable to agent "A" (Pet. p. 17a). With respect to this agent "A" in this prior art reference, one of the patentees of the patent in suit made the uncontested statement:

> ".... in general, the whole patent, this patent, teaches the preparation, to me, of a vegetable whipping cream in which an essential, necessary and critical emulsifying agent is a mixture of mineral salts." (DA 87)

There is no evidence as to what product would be produced if one left out this critical and essential mineral salt mixture.

The only other prior art relied upon by the petitioners is an article by C. D. Pratt in *Food Technology,* 1952 (DE 111-116). This article merely deals with the safe levels of use of four classes of emulsifiers in a wide variety of foodstuffs. Although it discloses the uses of these emulsifiers in many products, it does not even mention a vegetable oil type whipped topping let alone a topping containing a sub-

stituted cellulose. In the topping field it does not mention anything other than a whipping cream which is a natural dairy product containing protein. This is not a vegetable oil base whipped topping as covered by the patent in suit or as sold by petitioners and respondent (Pet. pp. 6a-7a and 18a).

2. "Difference Between The Prior Art And The Claims At Issue".

The claims at issue call for a combination of water, fat, a substituted cellulose of a special type and at least one of a specified group of emulsifiers (Pet. pp. 2a and 13a).

The British patent relied upon by petitioners teaches that it is essential to use two emulsifying agents "A" and "B" and that one of these is a mixture of mineral salts not "comparable" to any ingredient in the subject patent (Pet. p. 5a). The Pratt article, while it does mention the use of safe levels of emulsifiers in a natural dairy product made from whipping cream, does not say which, if any, combinations of emulsifiers with this natural dairy product would produce a result comparable to that achieved by the patent in suit; nor does it suggest any formula for such use; nor does it suggest how such a result could be achieved through the use of a particular emulsifier together with the teaching of the British patent (Pet. pp. 6a-7a).

3. "Level Of Ordinary Skill In The Pertinent Art"

The art of emulsions, and particularly the art of whippable emulsions, is not an exact science. The ingredients are complex organic compounds. The chemical and functional effects which occur when such ingredients are mixed is not clearly understood. The Record is replete with evidence that the results one may obtain by using different emulsifiers or other ingredients is very unpredictable (PA 63-9; PE 55-65). The state of the art is not yet such that a

satisfactory ingredient for use in an emulsion can be obtained merely by "reading a list and selecting a known compound to meet known requirements" *Sinclair & Carroll Co., v. Interchemical Corp.*, 325 U. S. 327, 335 (1945).*

Although petitioners assert that "Nothing could have been more obvious" than to try out the emulsifiers of the Pratt article in the formulae disclosed in the British patents (Pet. p. 8) there is *absolutely no* Record support for this contention. Petitioners' position regarding the obviousness of combining the prior art constitutes nothing more than a typical lawyer's argument based solely on hindsight.

The only Record evidence relied upon by petitioners to support their contention is found in the last paragraph on page 6 of their brief where they paraphrase some testimony of respondent's expert. But the Record pages referred to simply do not support this paragraph. There is not one statement by any witness that even comes close to saying that such a substitution would have been obvious. Quite the contrary. The pronouncements of the lower Courts that "This advance was the result of something more than simply the skill and knowledge possessed by one familiar with the art" (Pet. p. 9a) and "The patent in suit defines a new and useful product which represents a material advance over the prior art." (Pet. p. 18a) are clearly and unequivocally supported on the Record.

Perhaps the most telling fact on this point is the fact that the prior British patent issued in 1943 and the Pratt article was published in 1952 yet no competitor of respondent derived the composition covered by the patent until after the subject patent issued in 1959. In the meantime, the Record shows that one of the petitioners, Frank S. Mitchell, a man who had had a number of years of practical experience

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*Cited and distinguished on this very point in the *Adams* case at pp. 49-50.

in this art had made two separate and unsuccessful attempts to produce such a product prior to issuance of the patent in suit. It was only later, after he had obtained a copy of said patent, that petitioners were able to produce an infringing product. (Pet. pp. 9a and 19a) Thus, one of the petitioners* having a much higher skill than "a person having ordinary skill in the art",** twice tried and failed even though the art relied upon had been extant for many years.

A case in point is *Technical Tape Corp.* v. *Minnesota Mining & Mfg. Co.*, 247 F. 2d 343 (2 Cir. 1957), *cert. den.* 355 U. S. 952 (1958), wherein the Court stated:

> "Of course, after Drew's discovery it all seemed simple. With Drew's patent to point the way, infringing competitors would claim that it was so obvious that there really was nothing to it; that it did not require anything but mechanical skill and the use of known materials. But the demand had long existed; skilled men had sought to meet the demand without success. . . . In the recent case of Rohm & Haas Co. v. Roberts Chemicals Inc., 245 F. 2d 562, the Court of Appeals for the Fourth Circuit in reversing a District Judge's holding, 142 F. Supp. 499, that the patent in suit before him was invalid for anticipation, stated:
>
> " 'Since Hester tried and succeeded where Tisdale and the duPont Company tried and failed, we may fairly conclude that the discovery was not obvious to persons skilled in the art.' " (p. 347)

Against the foregoing background the non-obviousness of the subject matter of the subject patent is clearly established.

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*This man did post-graduate work in this art and had 18 years practical experience therein. (DA 148-9)

**35 U. S. C. § 103.

4. "Secondary Considerations As Indicia Of Non-Obviousness"

Turning to the "secondary considerations" which "may have relevancy" on the issue of obviousness or non-obviousness*, it is clear that on the facts of the present case they all indicate a lack of obviousness.

a) COMMERCIAL SUCCESS

As stated by the Court of Appeals the patented product enjoyed a "substantial and immediate success" (Pet. p. 9a).

Prior to the spring of 1956 respondent sold a non-cellulose type of product and after this date it sold the cellulose type of product covered by the patent in suit (PA 88, 90). The success of this patented product, as compared to the prior art, is demonstrated most vividly by a chart (PE 81) which shows the audited figures of respondent's sales of whipped topping for the years 1952-1963. This chart shows that respondent's sales of whippable emulsions went from one and one-half (1½) million to over eight (8) million dollars from 1955 to 1964.

This tremendous increase in sales subsequent to the adoption of the patented recipe was achieved through the intrinsic merits of the product and not as a result of a large increase in advertising of the product. Another chart (PE 82) shows that the ratio of respondent's promotional and advertising expenses to its sales remained almost constant throughout the entire period 1952-1963 (PA 94).

b) COMMERCIAL ACQUIESCENCE

Albeit respondent has had a very marked commercial success with its patented product the Record is clear that the only competitor that has infringed the patent is the

*_Graham_ case pp. 17-18.

petitioner, Michell Foods, Inc. (PA 31; 91-3). This is significant when it is appreciated that there are some fifty (50) competitors which market a non-infringing, non-cellulose type whipped topping product (PA 91). This clearly evidences a widespread respect for the subject patent in the trade.

c) Long Felt But Unsolved Needs

The antiquity of the prior art relied upon plus the fact that one of the petitioners tried to solve this problem for their needs without success plus the marked commercial success subsequent to the solution plus the immediate adoption of this product by respondent and petitioners after the patent issued clearly evidence a "long felt but unsolved need".

d) Failure of Others

It is evident that Mr. Mitchell had many years of experience in emulsion technology prior to and after the formation of his own company, such experience covering a span of over 18 years (Supra, p. 13). Yet Mr. Mitchell tried twice to evolve a cellulose type formula and failed. (Supra, pp. 6; 12-13). His success in this endeavor came only after he had a copy of the patent in suit at hand. It can only be concluded from this evidence that the invention covered by the patent in suit was not obvious to persons having "ordinary skill in the art".

From the foregoing it is seen that when the § 103 standards set forth in the *Graham* case are applied to the basic facts of the present case, a determination of non-obviousness is unavoidable. In this connection respondent invites a comparison of the facts established in the present case with those of the *Adams* case where this Court applied the standards of the *Graham* case and found the invention was not obvious.

VII. RESPONSE TO SPECIFIC ARGUMENTS BY PETITIONERS

Petitioners conclude their argument at page 9 of their brief with a paragraph that begins "The *real vice* of the Court of Appeals decision is that it removes from the public domain the use of the well-known commercial food emulsifiers, Spans, Tweens, Vrests, Myverols and Myrjs." This simply is not true.

The only material covered by the patent in suit is a specific four ingredient compound comprised of water, fat, a substituted cellulose and one or more of these specified emulsifiers. The Pratt article (DE 111-115), which petitioners rely upon so heavily, deals with the safe level of use of these emulsifiers in dozens of foodstuffs such as bakery goods, soft drinks, candy, multi-vitamin drops, etc., without, of course including the cellulose type whippable emulsion covered by the subject patent. Further, even in the relatively narrow field of whipped toppings where such emulsifiers may be used, the Record is clear that there are more than fifty (50) competitors selling competing types of whipped toppings and that all of them, except for petitioners, market a protein-type rather than a substituted cellulose-type product (PA 31; 91-3).

Thus, the upholding of the subject patent does not constitute any "real vice" either by removal of the stated emulsifiers from the foodstuffs field generally or by inhibiting competition in the whipped topping field beyond the scope of the specific four-ingredient composition covered by the subject patent.

The remainder of the last paragraph of petitioners' argument criticizes the lower Courts for their references to a specific emulsifier, namely "Myverol 18-85", in their decisions when this specific emulsifier with the suffix number "18-85" was not mentioned although "Myverol" was referred to

in the subject patent. There are two answers to this. First, the Record is clear that "Myverol 18-85" is a material which comes within the definition "a complex mixture resulting from the metathetical reaction of complete glyceride fat with an excess of glycerol" as found in both the specification and claims of the patent in suit (PE 1-5; DA 74-5). Second, petitioners are well aware that in the words of the Court of Appeals "The central issue of the case, as pursued by the parties at the trial and in their briefs in this Court, is a fairly narrow one and principally concerns the use of the term 'glyceryl monostearate' ". (Pet., pp. 3a-4a) Albeit this "central issue" has been avoided *in toto* by petitioners here, it was contested not only in the Courts below but in the Patent Office using "Myverol 18-85" to exemplify an ingredient of the patented composition. As a consequence this substance was referred to many times in the Record.

When the lower court decisions are read in light of this background it is only natural that they allude to "Myverol 18-85" as an illustrative example of an emulsifier that clearly comes within a somewhat complex chemical definition used in the patent and which was necessarily emphasized before them in view of the then "central issue" which petitioners have here chosen to ignore.

VIII. CONCLUSION

This case raises no issue which should be reviewed by this Court. It is an ordinary patent case. The Court of Appeals examined the scope and content of the prior art and ascertained the differences between this prior art and the claims at issue and resolved the level of ordinary skill in this art in accordance with the standards laid down in *Hotchkiss* v. *Greenwood* and more recently in the *Graham* case, and determined that the subject matter of the patent

in suit was not obvious under Title 35 U. S. C. § 103. That Court also considered the facts relevant to the "secondary considerations" which are indicia of obviousness as set forth in the *Graham* case and found that they clearly pointed to a holding of non-obviousness here. It is thus clear that the Court of Appeals applied the proper standards to the facts of this case and that in seeking review petitioners are asking this Court to do no more than review the Record and again apply the *Hotchkiss* v. *Greenwood* standard. Such a review of the facts and application of the same legal standard is not justified in this instance.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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